Supreme Court, U.S.
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No. 99-

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

DISTRICT OF COLUMBIA,
Petitioner,

v.

CYNTHIA D. CURRY,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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QUESTIONS PRESENTED

1. Whether, assuming that negligence is the standard of liability for holding an employer responsible for co-worker sexual harassment under Title VII of the Civil Rights Act of 1964, a complainant is barred from recovery if her employer establishes that she failed to discharge her co-ordinate Title VII duty of care.

2. Whether negligence is the standard for holding an employer liable for co-worker sexual harassment under Title VII and, if so, whether negligence must be measured according to common law principles or may be established by assessing with hindsight the "adequacy" of an employer's efforts to stop harassment of the complainant.

PARTIES

The parties in this Court are the Government of the District of Columbia and Cynthia D. Curry. Condwell Freeman was originally named as a defendant in the district court but was dismissed in that forum.

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DISTRICT OF COLUMBIA,
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CYNTHIA D. CURRY,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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The District of Columbia petitions this Court for a writ of certiorari to review a decision of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The November 9, 1999, decision of the United States Court of Appeals for the District of Columbia Circuit (App. 1-30) is reported at 195 F.3d 654. The June 3, 1998, decision of the United States District Court for the District of Columbia (App. 31-37) is reported at 9 F. Supp. 2d 1.

JURISDICTION

The D.C. Circuit issued its decision on November 9, 1999. App. 1. On December 9, the District of Columbia filed a timely petition for rehearing and a suggestion for rehearing *en banc*. App. 39 & 40. The petition and suggestion were denied on February 2, 2000. App. 39 & 40.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

This case involves Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. § 2000e *et seq.* It provides in pertinent part:

> It shall be an unlawful employment practice for *an employer* . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . ..

42 U.S.C. § 2000e-2(a)(1) (emphasis added).

STATEMENT OF THE CASE

I. RELEVANT CONTEMPORANEOUS FACTS.

This is a case of co-worker sexual harassment in which Detective Condwell Freeman harassed Detective Cynthia D. Curry, both of whom were employed by the District of Columbia Metropolitan Police Department ("MPD") in its Intelligence Division.[1] The two had had a consensual sexual relationship for a six-month period beginning in October, 1992. In May, 1994, after returning from a detail to another Division, Detective Freeman began to verbally harass Detective Curry on a regular basis. Detective Freeman asked whether she wanted him to slip her his "lizard," which Detective Curry understood, because of their prior relationship, to

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[1]We view the evidence and all reasonable inferences that can be drawn therefrom in the light most favorable to the respondent, including her testimony that she was sexually harassed for more than two years by Detective Freeman. It should be noted, however, that he denied her charges.

be a reference to his penis. This verbal harassment ended on August 12, 1994, when Detective Curry stopped speaking to him.

Detective Curry first reported this harassment to her supervisor, Sergeant Jacob Major, in early September, after he had reproached her for failing to complete an assignment. In response to her report, Sergeant Major warned Detective Freeman that the MPD did not tolerate this kind of conduct and that he should stop it, if he was doing it. Sergeant Major also reported Detective Curry's charge to the MPD's Equal Employment Opportunity ("EEO") Office -- where Detective Curry should have filed a complaint in accordance with clear MPD policy. The EEO Office began to investigate immediately, although Detective Curry had not filed a complaint (and would not file a complaint until September 30). In January, 1995, the Office issued a probable cause finding and instructed Detective Curry that she could proceed to the District's Office of Human Rights ("OHR").[2] Detective Curry then filed a complaint *against the MPD* with the OHR, and the OHR began its investigation.

On November 7, 1995, more than a year after she filed her belated complaint about verbal harassment by Detective Freeman, Detective Curry happened to answer a telephone call from Lieutenant Emmogean Simpson-Jones of the MPD's EEO Office. The lieutenant asked how things were going, and Detective Curry "said that basically they were fine, but he [Detective Freeman] was glaring at her." App. 41. At no

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[2]The MPD itself was unable to pursue a formal disciplinary charge against Detective Freeman because it had failed to complete its internal investigation within 45 working days. App. 5 & 5 n.6. While the MPD was subject to this constraint, the OHR was not so limited.

time, however, did Detective Curry file a complaint about this conduct. Nor did she state that she regarded this "glaring" as *sexual* harassment.

In response to Detective Curry's remark, Lieutenant Alton Bigelow of the MPD's EEO Office relayed it to Detective Freeman and warned him against acts of intimidation. Detective Freeman was also asked if he would agree to a transfer, and he declined. In addition, on December 14, 1995, the MPD's EEO Office (Director Brenda S. Wilmore and Lieutenant Bigelow) sent Detective Curry a memorandum which stated:

> This memorandum is in response to your request that Detective . . . Freeman be transferred . . .. Your complaint is that you are experiencing a "hostile environment," because he constantly "glares" at you. However, you related that there is no verbal communication between the two of you.
>
> Due to agency constraints, we are unable to act upon your request. I have been informed that you do not wish to change your assignment at this time; however, should you change your mind, this office would assist you in this endeavor. Please contact this office in the event that you are subjected to any treatment which you deem to be harassment, or acts of reprisal and retaliation.

App. 41-42.

In January, 1996, the OHR also found probable cause. This finding was based solely on documentary evidence, including the MPD EEO Office's detailed reports of the informal interviews it conducted during its investigation.

Subsequently, Detective Curry withdrew her OHR complaint and, in 1997, filed suit in the United States District Court for the District of Columbia against the District and Detective Freeman under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, 42 U.S.C. § 2000e *et seq.* That court had jurisdiction pursuant to 28 U.S.C. § 1331 & 1343(3) and 42 U.S.C. § 2000e(5)(f).

II. Additional Trial Evidence.

At trial, Detective Curry testified that Detective Freeman had been undressing her with his eyes on virtually a daily basis from sometime in September, 1994, until June, 1996, when she requested, and was granted, a transfer from the Intelligence Division. She admitted that she did not mention this visual harassment to the EEO Office on September 30, 1994, when she filed her formal complaint about his verbal harassment (which, by then, had ended) and had not subsequently alerted the MPD about it except for her casual "glaring" remark on November 7, 1995. Furthermore, she did not testify that she told Detective Freeman to stop it.

The district court (Sporkin, J.) submitted to the jury Detective Curry's claims that she was entitled to damages for Detective Freeman's verbal harassment, and for his visual harassment, both before and after November 7, 1995, until June, 1996. The jury awarded damages of $100,000. App. 36.

III. The Decisions Below.

A. The District Court.

Following the jury verdict, the district court denied the District's motion for judgment as a matter of law. Insofar as

is relevant here, the court ruled that there was sufficient evidence of continued harassment after the District had notice. App. 33. Detective Curry had demonstrated how Detective Freeman would "slowly and deliberately look her up and down," and this visual harassment could be "combined with the prior history of Detective Freeman's" verbal harassment. App. 33-34. The court also ruled that the "the jury could have concluded that the [District's] corrective action was inadequate. The [District] took no steps to separate the parties except to afford [Detective Curry] the opportunity to leave the Intelligence Unit." App. 34.

B. The Court of Appeals.

On appeal, the D.C. Circuit issued a one-sentence *per curiam* decision.[3] App. 2. The court exonerated the District in several respects: First, the District was entitled to judgment as a matter of law on Detective Curry's verbal harassment claim covering the period May through August, 1994, because Detective Curry did not report it until after it had ended. App. 11-12 n.15 (Henderson, J.); App. 18 (Wald, J.). Second, the MPD took reasonable steps to prevent sexual harassment in the workplace; to admonish Detective Freeman; and to investigate her belated complaint of verbal harassment. App. 11 (Henderson, J.). Third, the District was not responsible for Detective Freeman's visual harassment from September, 1994, through November 7, 1995, when Detective Curry reported, for the first (and only) time, that Detective Freeman was glaring at her. App. 12-13 (Henderson, J.).

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[3]Judges Henderson and Wald wrote substantive opinions. See App. 2-17 & 18-29. Judge Randolph joined Judge Henderson's opinion on liability, but not damages, and he concurred in one part of Judge Wald's opinion on damages. App. 30.

However, the court also ruled that the District properly could be found liable for Detective Freeman's visual harassment for a seven-month period after November 7. The court rejected the District's argument that, if an employee fails to act as a reasonable person in response to sexual harassment by a co-worker, her claim should be barred even if her employer can be deemed negligent. The court characterized this argument as a proposal for "a modified supervisory harassment standard for co-worker harassment" and ruled that the District got the "standard wrong." App. 9 n.12 (Henderson, J.). The court also ruled that a jury could fault the "adequacy" of the District's response to Detective Curry's fortuitous and casual remark that Detective Freeman was glaring at her because Detective "Freeman by this point was a 'repeat offender.'" App. 13. The court so ruled even though Detective Curry never filed a complaint about Detective Freeman's glaring with the MPD's EEO Office; had not reported even informally, as she maintained at trial, that this conduct was sexual (*i.e.*, that Detective Freeman was undressing her with his eyes); and the only basis for attributing to the MPD knowledge that Detective Freeman was a repeat offender was its EEO Office's finding of probable cause based on informal *ex parte* interviews.

Despite finding the District not liable for some 20 of the 28 months of sexual harassment Detective Curry claimed, the court below affirmed the entire $100,000 jury award. Judge Henderson would have granted a new trial limited to damages because Detective Curry's verbal harassment claim and pre-November 7, 1995, visual harassment claim should never have gone to the jury; most of Detective Curry's physical problems "occurred sometime in 1994, nearly one full year, if not more, before she reported the glaring." App. 15. However, Judge Wald, joined by Judge Randolph, ruled that a new trial on damages was not necessary because "[a] reasonable jury

could well have found that the harassment which occurred from November, 1995, to June, 1996, when Curry left the unit, caused Curry to suffer $100,000 in damages, especially when viewed against the backdrop of Freeman's prior harassment." App. 27; see App. 30.

REASONS FOR GRANTING THE WRIT

Review of the D.C. Circuit's decision is necessary for several reasons.

First, the decision conflicts with *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998); and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). It is at odds with the principles and policies of Title VII as articulated in those cases; and it undermines the "primary objective" of Title VII which "is not to provide redress but to avoid harm." *Faragher*, 524 U.S. at 806 (internal quotation marks omitted). If, as this Court indicated in *Ellerth-Faragher*, an employer may be held liable for co-worker sexual harassment under Title VII only if the victim establishes negligence, an employer must be exonerated if it establishes that the victim failed in her co-ordinate duty to exercise due care -- by invoking its complaint procedure, or otherwise fairly apprising it of the offending conduct, and by avoiding reasonably avoidable harm.

Second, this Court has not squarely decided whether negligence is the standard of liability for holding employers responsible under Title VII for co-worker sexual harassment. Nor has it furnished guidelines for determining negligence in this context. The D.C. Circuit's negligence standard is in effect dangerously close to strict vicarious liability. The D.C. Circuit's negligence calculus consisted of only a modest inquiry into whether a jury in hindsight could fault the "adequacy" of an employer's response to an employee's fortuitous

and informal complaint that did not fairly apprise the employer that she was being subjected to unwanted *sexual* attention. This standard conflicts with the standard applied by other Circuits and with the accepted common law understanding of that standard.

Third, these issues are exceptionally important. This Court has not yet delineated the legal standards applicable to employer liability for co-worker harassment, a problem which affects thousands of employers and millions of employees in this country.

I. THE D.C. CIRCUIT'S DECISION CONFLICTS WITH THE PRINCIPLES AND POLICIES OF *ELLERTH* AND *FARAGHER*.

The D.C. Circuit's decision conflicts with the principles and policies of *Ellerth* and *Faragher*. In those cases, this Court ruled that courts must consider common law agency principles, and the policies and goals of Title VII in formulating standards of employer liability for sexual harassment in the workplace. The D.C. Circuit failed to do that here when it ruled that the District got the "standard wrong" in urging that even a negligent employer must be excused from liability in a case of co-worker harassment brought by a victim who utterly failed to discharge her co-ordinate duty of due care.

A. *Ellerth-Faragher* And Supervisory Harassment.

In *Ellerth* and *Faragher*, this Court held that, in the case of supervisor harassment which does not result in an adverse, tangible job consequence, an employer may be held vicariously liable for actionable harassment. This Court also held that an employer may avoid such liability only if it establishes a two-part affirmative defense. This defense requires an em-

ployer to prove that it was not negligent and that the victim of harassment failed to discharge her co-ordinate duty of care.

This Court explained that "[t]he requirement to show that *the employee has failed in a coordinate duty to avoid or mitigate harm* reflects an . . . obvious policy imported from the general theory of damages, that a victim has a duty to use such means as are reasonable under the circumstances to avoid or minimize the damages that result from violations of the statute." *Faragher*, 524 U.S. at 806 (emphasis added) (internal quotation marks omitted). This Court also explained that Title VII's principal purpose is to *prevent* sexual harassment that affects the terms and conditions of employment: The "primary objective" of Title VII "is not to provide redress but to avoid harm." *Faragher*, 524 U.S. at 806 (internal quotation marks omitted).

As a consequence, in cases of supervisor harassment, an employer may be excused if it can establish not only due care on its part but a lack of due care on the part of the victim. The latter aspect of the employer's affirmative defense encourages victims to act as reasonable women should act. And it was imposed even though the Court recognized that an employee sexually harassed by a supervisor is at a distinct disadvantage in facing him head on. *Faragher*, 524 U.S. at 803 ("When a fellow employee harasses, the victim can walk away or tell the offender where to go, but it may be difficult to offer such responses to a supervisor . . ..").

B. *Ellerth-Faragher* And Co-Worker Harassment.

In *Ellerth* and *Faragher*, this Court also noted, with seeming approval, that the Circuits had unanimously adopted a negligence standard for holding an employer responsible for

co-worker sexual harassment. The D.C. Circuit purported to adopt this standard. At the same time, however, it rejected the District's argument that an employer is not liable for co-worker harassment if it establishes that the complainant did not use due care.

For the reasons that follow, *Ellerth-Faragher* requires recognition of such a defense. Thus, assuming that a negligence standard is applicable to employer liability for co-worker sexual harassment, an employer should not be held liable for such harassment if the victim failed to use due care by notifying her employer of the offending conduct and avoiding reasonably avoidable harm. This affirmative defense is necessary given *Ellerth-Faragher's* emphases that, under the common law, a complainant has a "corresponding" and "coordinate duty" of care, and that the principal purpose of Title VII is to prevent workplace harassment, not to provide damages awards. *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807 & 806. Unless such an affirmative defense is imposed, Title VII may provide a financial incentive to victims of co-worker sexual harassment not to speak out at a time and in a manner to prevent actionable sexual harassment.

Restatement (Second) of Agency § 525 (1957) addresses an employee's co-ordinate duty of care for her own safety in cases in which her employer has been negligent. It provides: "A servant harmed by a violation of the master's duty of care is subject to the defense of contributory negligence if his own negligence is a contributing cause of the harm." The comments to this section explain that a servant is contributorily negligent if he unreasonably fails to report or repair a dangerous situation or if he "disobeys rules intended for his protection . . .." *Id.* Comments d & e. Furthermore, Comment f provides that "[t]he doctrine of avoidable consequences prevents a servant, hurt by the fault of the master, from

recovering damages for further harm which the servant could have averted by the use of reasonable care."[4] In short, unless the principles and policies of Title VII dictate otherwise, employers should not be held liable to victimized employees who fail to exercise due care for their own well being in cases of co-worker sexual harassment.

The principles and policies of Title VII certainly do not dictate otherwise. To the contrary, they support extending to employers in cases of co-worker sexual harassment a defense that a complaining employee has failed to discharge her co-ordinate duty of due care. Unless such a co-ordinate duty is imposed on a victim of sexual harassment by a co-worker, she may recover substantial damages from her only marginally negligent employer even though she did not lift a finger to help herself -- either by invoking her employer's complaint procedure or by telling her co-worker "where to go." *Faragher*, 524 U.S. at 803 ("When a fellow employee harasses, the victim can walk away or tell the offender where to go . . ."). It is thus fair to place on a complainant facing co-worker harassment an obligation to take reasonable steps to stop the harassment and to bar any negligence action against her employer where she has failed to do so with respect to the conduct about which she complains.

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[4]Comment g, in turn, provides: ". . . [S]tatutes for the protection of a class may be interpreted as protecting them not only from the effects of the master's negligence, but also from the effects of their own contributory negligence, as in the cases of statutes prohibiting the employment of children beneath a specified age." Restatement (Second) of Agency § 525, Comment g. Title VII plainly may not be so interpreted because any such interpretation would be fundamentally at odds with its premise of gender equality.

The co-ordinate duty of due care imposed on employees by *Ellerth-Faragher* also reflects the principal premise of Title VII. That premise is that women in the workplace are presumptively equal to men. And it necessarily means that women in the workplace are capable of communicating to male co-workers whether their advances are welcome or not and of invoking an employer's anti-harassment procedure when such advances continue after women have clearly indicated that they are unwelcome. Women cannot reasonably leave at the workplace entrance their ordinary means of combatting unwelcome behavior.

In contrast to *Ellerth-Faragher*, the D.C. Circuit ruled that the reasonableness of the complainant's conduct -- in alerting her employer to such harassment and in otherwise protecting herself from harassment -- is relevant only when assessing the reasonableness of an employer's conduct and must otherwise be ignored in determining whether liability is appropriate. The D.C. Circuit rejected the District's argument that employees have a co-ordinate duty of care. Under the D.C. Circuit's rule, a victim of co-worker sexual harassment may be permitted to recover damages against her employer even though she utterly failed to act as a reasonable woman in combatting what she perceived as harassment.

C. An Employee's Co-Ordinate Duty Of Care.

In *Ellerth-Faragher*, this Court held that an employer ordinarily should be excused from liability if (1) it has "promulgated an anti-harassment policy with complaint procedure" and (2) a complainant unreasonably fails to take steps to avoid harm, *including* "an unreasonable failure to use any complaint procedure provided by the employer . . .." *Ellerth*, 524 U.S. at 765.

This Court explained the second part of that defense as follows. First, it is established if a "plaintiff employee unreasonably failed to take advantage of *any preventive or corrective opportunities provided by the employer or to avoid harm otherwise*." *Ellerth*, 524 U.S. at 765 (emphasis added). In addition, this Court stated that "while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing an unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice" to establish that the complainant did not exercise reasonable care to prevent harm to herself. *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807. Finally, this Court explained, that, in cases of co-worker harassment, not only is a purported victim expected to promptly invoke her employer's procedure for halting such harassment, she may also be expected to walk away from her harasser and/or tell him "where to go." *Faragher*, 524 U.S. at 803.

When the proper rule is applied in this case, it is apparent that Detective Curry miserably failed to discharge her coordinate duty of due care. Detective Curry failed to take reasonable steps to avoid the avoidable consequences of Detective Freeman's visual harassment even after November 7, 1995. She did not tell Detective Freeman to stop it. She did not adequately notify the MPD of the nature and depth of her complaint, and she did not bother to file a complaint in accordance with MPD EEO procedure. Instead, in a fortuitous telephone call, she casually mentioned that Detective Freeman was "glaring" at her, which is a complaint quite different from her "undressing" complaint at trial. In other words, she did virtually nothing to protect herself. Indeed, it can fairly be said that Detective Curry was deliberately indifferent to her own well-being.

The fact that Detective Curry, as a matter of law, failed to discharge her co-ordinate duty of due care for her own safety is also illustrated by decisions from other Circuits construing an employee's co-ordinate duty of reasonable care (in the context of supervisory harassment). The Seventh Circuit requires Title VII complainants to "make *a concerted effort* to inform the employer that a problem exists." *Shaw v. Autozone, Inc.*, 180 F.3d 806, 813 (7th Cir. 1999) (emphasis added) (internal quotation marks omitted), *cert. denied*, 68 U.S.L.W. 3430 (Jan. 10, 2000).[5]

In applying this test, the Seventh Circuit affirmed summary judgment in favor of the employer in the case of harassment over a four-month period which caused the complaining employee to quit without ever reporting the harassment to her employer. The court concluded that the complainant in that case "acted in precisely the manner that a victim of sexual harassment should *not* act in order to win recovery under the new law." *Id.* at 813 (emphasis supplied by the court). It explained: "Sh[e] concedes that she never alerted anyone at Autozone to Noble's inappropriate activities. *She did not even tell Noble to stop making the offensive comments.* . . . As we have often said, the law against sexual harassment is not self-enforcing and *an employer cannot be expected to correct harassment unless the employee makes a concerted effort to*

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[5]This has been the approach in the Seventh Circuit for several years. In *Baskerville v. Culligan Internat'l Co.*, 50 F.3d 428 (7th Cir. 1995), for example, the court faulted the complainant for taking three or four months to complain and then for using the wrong channel -- her supervisor's superior -- to complain. It explained: "The company's sexual harassment policy, as she admitted knowing, requires that complaints of sexual harassment be made to the company's human resources department." *Id.* at 432.

inform the employer that a problem exists." *Id.* at 813 (emphasis added) (internal quotation marks omitted).

Similarly, in *Silk v. City of Chicago*, 194 F.3d 788 (7th Cir. 1999), a hostile work environment case involving the Chicago Police Department ("CPD"), the court faulted the employee for not bringing "his complaint to the proper authorities through the proper complaint procedures, which would have put the City on notice." *Id.* at 806. In addition, the court ruled:

> The one complaint to management about one incident is not sufficient, in this case, to have put the CPD or the City on notice that the Sergeant was experiencing widespread and persistent harassment. Harassment laws cannot be effective if incidents are not reported, and *an employer cannot be expected to correct harassment unless the employee makes a concerted effort to inform the employer that a problem exists.*

Id. at 807 (emphasis added) (internal quotation marks omitted). *See also, e.g.*, *Montero v. Agco Corp.*, 192 F.3d 856, 863 (9th Cir. 1999) (employer satisfied second prong of *Faragher* by showing that complaining employee waited for almost two years to complain although she had been aware of its policy prohibiting sexual harassment); *Caridad v. Metro-North Commuter Railroad*, 191 F.3d 283, 295 (2d Cir. 1999) (ruling that employer satisfied second prong of *Faragher* because employee did not report workplace harassment; refusing to countenance employee's concern about reaction of co-workers; and finding that her other reasons for not reporting were "not based on a credible fear that her complaint would not be taken seriously or that she would suffer some adverse employment action as a result of filing a complaint"), *petition for certiorari pending*, No. 99-1084 (filed December 27, 1999).

Here, of course, even on November 7, 1995, Detective Curry did not inform the MPD's EEO Office of the nature of Detective Freeman's visual harassment or the effect it was having on her. Under the approach of the Second, Seventh and Ninth Circuits, therefore, and assuming that victims of co-worker sexual harassment may not hold their employer liable in cases where they have failed in their co-ordinate duty of due care, Detective Curry is not entitled to any damages against the District.

D. The Proper Role Of An Employee's Co-Ordinate Duty Of Care In Co-Worker Sexual Harassment Cases.

Just as this Court in *Ellerth-Faragher* imposed a co-ordinate duty of due care on victims of supervisory sexual harassment, the same duty must be imposed on the victims of unwelcome sexual advances by co-workers in order to encourage them to respond reasonably to such conduct and to discourage them from allowing their damages to multiply. Given the common law and the nature of the workplace, however, the duty in the context of co-worker sexual harassment must necessarily play a somewhat different role: If an employee fails to act as a reasonable person in response to sexual harassment by a co-worker, and thus fails to discharge her co-ordinate duty of due care, she may not invoke Title VII against her employer even if her employer was negligent.

II. THE D.C. CIRCUIT'S NEGLIGENCE STANDARD IS INCONSISTENT WITH *ELLERTH-FARAGHER*, THE DECISIONS OF OTHER CIRCUITS; AND AMOUNTS TO STRICT LIABILITY.

In *Ellerth-Faragher*, this Court cited with approval the consensus among the Circuits that, in a case of co-worker

sexual harassment, a complainant must establish that her employer was negligent. *Faragher*, 524 U.S. at 799 (citing cases). This Court should grant review here not only to adopt that legal standard but also to further explicate the meaning of negligence in the context of Title VII.

The D.C. Circuit purported to apply a negligence standard, but, in fact, applied a less demanding "adequacy" standard (App. 13) that is nearly, if not exactly, a strict vicarious liability standard. The D.C. Circuit has held that a victim of unwanted "dirty looks" by a co-worker may recover $100,000 in damages against her employer even though she never fairly and formally apprised her employer of his conduct and its effects on her. She may recover such damages even if she merely told her employer's EEO officer, in a fortuitous and casual conversation, that her co-worker was "glaring" at her and even if she never uttered a word of protest to her co-worker. Conversely, under the D.C. Circuit's standard, an employer must respond to every complaint of co-worker incivility as if it were a complaint of serious sexual harassment that interferes with the terms and conditions of the complainant's job.

This is not the law of Title VII, or of negligence. Even in the case of supervisor harassment, this Court has held that an employer may not be found negligent if it establishes that it "had exercised reasonable care to avoid harassment and to eliminate it when it might occur . . .." *Faragher*, 524 U.S. at 805. In *Ellerth-Faragher*, this Court also ruled that an employer ordinarily should not be found to be negligent if it has "promulgated an antiharassment policy with complaint procedure." *Ellerth*, 524 U.S. at 765. No more stringent legal requirements can be placed on employers when it comes to complaints of co-worker harassment.

The Seventh Circuit has correctly further explicated the negligence standard in the context of Title VII sexual harassment:

> The employer's legal duty is . . . discharged if it takes reasonable steps to discover and rectify acts of sexual harassment of its employees. . . . [W]hat is reasonable depends on the gravity of the harassment. *Just as in conventional tort law a potential injurer is required to take more care, other things being equal, to prevent catastrophic accidents than to prevent minor ones, . . . so an employer is required to take more care, other things being equal, to protect its female employees from serious sexual harassment than to protect them from trivial harassment.*

Baskerville v. Culligan Internat'l Co., 50 F.3d at 432 (Posner, C.J.) (emphasis added).

There are sound reasons for the approaches taken by this Court and the Seventh Circuit. Even assuming that it would be wise, employers simply do not have the resources to police all the interactions between supervisors and their subordinates, much less among co-workers. As Chief Judge Posner has stated, "[i]t is facile to suggest that employers are quite capable of monitoring a supervisor's actions affecting the work environment." *Jansen v. Packaging Corp. of America*, 123 F.3d 490, 513 (7th Cir. 1997) (*en banc*) (Posner, C.J., concurring and dissenting), *aff'd sub nom., Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998). He explained: "Large companies have thousands of supervisory employees. Are they all to be put under video surveillance? Subjected to periodic lie-detector tests? Trailed on business trips by company spies? Even the EEOC does not go so far." *Id.* at 513. That observation, of course, applies with even greater

force to office flirtations and romantic proposals, welcome and unwelcome, among co-workers in this country.

The D.C. Circuit's decision conflicts with *Ellerth-Faragher* and *Baskerville*. If their principles are applied here, the District's response to Detective Curry's complaint that a co-worker was "glaring" at her cannot, as a matter of law, be deemed negligent. She never invoked the MPD's EEO process to complain about Detective Freeman's visual harassment. Instead, she fortuitously made a casual and tepid complaint about "glaring" to an MPD EEO officer. In response, Lieutenant Bigelow admonished Detective Freeman. And the MPD's EEO Office offered to assist Detective Curry in transferring to another position.

In contrast to her telephone complaint, Detective Curry, at trial, testified that Detective Freeman had been constantly undressing her with his eyes, causing her severe emotional distress, from September, 1994, through June, 1996. In other words, Detective Curry complained to the MPD about a "molehill" in November, 1995, and then accused the District of wrongdoing because the MPD did not treat her complaint as being about a "mountain." This is not negligence. An employer acts reasonably in treating a complaint about a molehill as a molehill. (Conversely, an employee acts unreasonably in not treating a mountain of harassment as a mountain.) Detective Curry's tepid, informal, and fortuitous complaint did not fairly apprise the District that she was being subjected to continuous unwanted *sexual* attention.[6]

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[6]Here, moreover, in December, 1995, the MPD conveyed to Detective Curry in writing its understanding of the nature of her complaint. *See supra* at 4. If that understanding was wrong, Detective Curry should have corrected the error.

To be sure, unbeknownst to the District's MPD, its anti-harassment policy and its verbal warnings against sexual harassment (and intimidation) did not completely succeed. Although Detective Freeman did not resume his verbal harassment, he substituted visual harassment. However, Title VII "does not require success -- it only requires that an employer act reasonably to prevent sexual harassment." *Shaw v. Autozone, Inc.*, 180 F.3d at 812. The MPD reasonably interpreted Detective Curry's remark that Detective Freeman was "glaring" at her as conveying hostility, not sexuality; and it verbally admonished him. This was reasonable.

We mention only one other point about the reasonableness of the MPD's response. The D.C. Circuit emphasized that, by the time Detective Curry remarked that Detective Freeman was "glaring" at her, he was a "repeat offender . . .." App. 13. The only basis for this characterization is the MPD EEO Office's *probable cause* finding. This was not, however, a finding of guilt. Furthermore, the Office made this finding although (1) there was no corroboration of Detective Curry's claim of repeated verbal harassment and (2) Detective Freeman, a veteran officer with more than 20 years of service, had never been charged with harassment by anyone else. Finally, Detective Curry's second charge, also without corroboration, conveyed not sexual harassment, but simple hostility, and, on that count, he was not suspected of being a repeat offender.

In short, this Court should grant review both to rule that negligence is the standard of liability in cases of co-worker sexual harassment and to articulate the meaning of negligence and thereby ensure that a standard of negligence, rather than a less demanding standard, is applied in this context. This is of particular importance to governments -- the United States, the states, and local governments -- which have especial

obligations of fairness to employees charged with misconduct, and to the public which must pay any judgment against them.

CONCLUSION

This petition raises important and constantly recurring issues that have been wrongly decided by the D.C. Circuit and that should be resolved by this Court. This Court should grant the petition for a writ of certiorari; delineate the legal principles applicable to employer responsibility for co-worker harassment under Title VII; and reverse the decision below.

Respectfully submitted,

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APPENDIX

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued September 15, 1999 Decided November 9, 1999

No. 98–7121

CYNTHIA D. CURRY,
APPELLEE

v.

DISTRICT OF COLUMBIA,
APPELLANT

Appeal from the United States District Court
for the District of Columbia
(No. 97cv01088)

Donna M. Murasky, Assistant Corporation Counsel, argued the cause for the appellant. *Jo Anne Robinson*, Interim Corporation Counsel, and *Charles L. Reischel*, Deputy Corporation Counsel, were on brief.

Elizabeth Margaret Boyle argued the cause for the appellee. *Ted Justice Williams* was on brief.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Before: WALD, HENDERSON and RANDOLPH, *Circuit Judges*.

Opinion for the court filed *Per Curiam*.

Circuit Judge HENDERSON filed a separate opinion.

Circuit Judge WALD filed a separate opinion.

Circuit Judge RANDOLPH filed a separate opinion.

Per Curiam: In accordance with the accompanying separate opinions, the district court's order denying the motion for judgment as a matter of law is affirmed in part and reversed in part and the district court's judgment on the verdict for plaintiff is affirmed.

KAREN LECRAFT HENDERSON, *Circuit Judge*:

Cynthia D. Curry brought suit against her employer, appellant District of Columbia (District), claiming sexual harassment in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e *et seq.* The source of the alleged sexual harassment was a co-worker in the District's Metropolitan Police Department (MPD). Following trial in the district court, a jury awarded Curry $100,000 in damages. The District filed a motion for judgment as a matter of law or, in the alternative, for a new trial or remittitur. Upon the district court's denial of its motion, *Curry v. District of Columbia*, 9 F. Supp. 2d 1 (D.D.C. 1998), the District appealed. On appeal, the District challenges both the jury's finding of liability and the award of damages. As explained below, we affirm the district court's denial of post-trial relief in part and reverse in part. In addition, I would remand for further proceedings as to damages.

I.

Curry joined the MPD as a uniformed officer in October 1986. Six years later, she was transferred to the Domestic Security Section of the MPD's Intelligence Unit where she met Detective Condwell Freeman. Curry and Freeman soon began an intimate relationship which lasted about six months and then "just ended" in April 1993. Joint Appendix (JA) 111.

In July 1993 Curry was again transferred to a different unit and did not return to the Intelligence Unit until the following May. Upon Curry's return, Freeman began a daily routine of telling her sexual jokes and suggesting, while grabbing his crotch, that she allow him to "slip her the lizard."[1] JA 112–13. This conduct continued from mid-May 1994 until August 12, 1994, when Curry stopped speaking to Freeman.

In early September 1994 Curry told Sergeant Jacob Major, who was her (and Freeman's) direct supervisor, that Freeman had been sexually harassing her. Her report followed a three-week period for which Major, who was on vacation during that period, had appointed Freeman acting sergeant in charge of the Unit. Upon his return, Major admonished Curry for submitting an untimely report. Curry explained that she had completed the work but waited for Major's return before re-submitting the report because she wanted to avoid Freeman.[2] Major then referred Curry to the MPD Labor Relations, EEO Office. Adhering to the MPD's formal complaint procedure, Major initially denied Curry's request that he speak with Freeman about the problem. Subsequently, however, Major asked Freeman about the allegations, which Freeman denied, and advised Freeman that sexual harassment would not be tolerated. Major also alerted Lieutenant Cheryl Peacock, the MPD's EEO Officer, to Curry's complaint. Although Curry did not contact the EEO Office until September 30, Peacock began to investigate the matter immediately. The investigation lasted over four months and included interviews of Freeman and other co-workers.

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[1] Curry understood from their earlier relationship that Freeman's references to "lizard" and "zard" meant his penis.

[2] Freeman had ordered Curry to make corrections to the first draft of the report. Finding certain corrections had not been made, Freeman demanded them again for the second draft. Curry told him she thought he was harassing her for rebuffing his sexual overtures and that she intended to wait for Major's return before re-submitting the report.

On September 30, 1994 Curry filed a complaint with the MPD's EEO Office. Earlier that day, Freeman, while speaking loudly to a third party in earshot of Curry, had stated repeatedly that he would sue anyone who made unsubstantiated allegations against him. Curry at that time told Peacock about Freeman's "lizard" remarks, including that they had ceased. She also reported the incident involving the redrafted reports when Freeman was acting sergeant and Freeman's remarks she had overheard that morning. Curry reported no other form of harassment. Shortly thereafter, she requested and received a transfer to the Analytical Section of the Intelligence Unit, which was on the same floor as the Domestic Security Section but in a different wing of the building. JA 497. Roughly ten months later, during August 1995, the MPD undertook a wholesale reorganization of its offices which put Curry's and Freeman's offices in closer proximity.

On January 23, 1995[3] the EEO Office issued a report on its investigation of Curry's charges. The report found probable cause to believe Freeman had verbally harassed Curry, that is, probable cause "to sustain the allegations that sexual harassment has occurred."[4] JA 776. Peacock, the investigating officer who authored the report, testified that "the workplace ... was filled with sexual jokes, sexual language." JA 306. Captain Alan Dreher, the head of the Intelligence Unit, learned of the report and personally admonished Freeman that sexual harassment would not be tolerated and, if it was going on, it was to stop. The EEO Office advised Curry by letter that she could file a complaint with the District's Department of Human Rights and Minority Business Development (DHR).[5] The EEO Office's finding notwithstanding,

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[3] The EEO Office's investigative report bears a January 23, 1996 date stamp. JA 771. As the parties and the record make clear, the correct date of the report is January 23, 1995. *See* Br. of Appellant at 14; Br. of Appellee at 3; JA 798.

[4] The report responded to Curry's formal complaint of verbal harassment.

[5] The MPD's EEO Office and the parties refer to the DHR as the "Office of Human Rights" and the "OHR." *E.g.*, JA 798. Its

the MPD's collective bargaining agreement and D.C. Code § 1–617.1(b–1)(1) (1992)[6] prohibited the MPD from taking disciplinary action against an officer more than forty-five days after the MPD became aware of the officer's improper conduct. Peacock's investigation took more than forty-five days to complete and the District took no formal disciplinary action against Freeman. In June 1996 Curry transferred to the Court Intelligence Unit.

Although she made no mention of it until November 1995, Curry also claimed Freeman regularly glared at her in a harassing manner from the time his verbal harassment ceased in August 1994 until her June 1996 transfer out of the Unit. She testified that Freeman "would look at [her] in a way that made [her] most uncomfortable, as if he was undressing [her]." JA 235. Although Curry never invoked the MPD's formal complaint procedure with regard to Freeman's glaring, she did report it to supervisory personnel. She first complained on November 7, 1995, during a telephone conversation initiated by Lieutenant Emmogean Simpson–Jones of the MPD's Labor Relations, EEO Office, who asked her how things were going. Although the record is unclear, apparently sometime between November 7 and December 14, 1995 Curry also requested that the MPD transfer Freeman. On December 14, 1995 the EEO Office issued a memorandum in which the MPD's EEO Director Brenda Wilmore noted that Curry complained she was "experiencing a 'hostile environment,' because [Freeman] constantly 'glare[d]' at [her]" and that there was "no verbal communication" between the two. JA 760. The memorandum concluded that "agency constraints" left the EEO Office unable to act on her request to

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proper name is as noted in the text. JA 761. Ultimately, on June 10, 1996 the DHR also found probable cause to believe that Freeman sexually harassed Curry. JA 761.

[6] In 1995 section 1–617.1(b–1)(1) provided that "no corrective adverse action shall be commenced pursuant to this section more than 45 days . . . after the date that the agency knew or should have known of the act or occurrence allegedly constituting cause." It has since been repealed. *See* D.C. Code § 1–617.1 (1999).

transfer Freeman.[7] The Director did offer to help Curry transfer if she so desired. At that time Lieutenant Alton Bigelow, another EEO officer, advised Freeman of Curry's report about his glaring and "warned him against acts of intimidation." JA 764. Bigelow asked Freeman to agree to a transfer, a request Freeman declined.[8]

II.

This court reviews *de novo* the trial court's denial of a motion for judgment as a matter of law or, in the alternative, for a new trial. *Swanks v. Washington Metro. Area Transit Auth.*, 179 F.3d 929, 933 (D.C. Cir. 1999). The jury verdict stands "unless the evidence and all reasonable inferences that can be drawn therefrom are so one-sided that reasonable men and women could not disagree on the verdict." *Smith v. Washington Sheraton Corp.*, 135 F.3d 779, 782 (D.C. Cir. 1998) (internal quotation marks omitted). Nevertheless, evidence supporting the verdict must be "more than merely colorable; it must be significantly probative." *Id.* (internal quotation marks omitted).

A.

Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e–2(a)(1). A claim of sexual harassment is cognizable under this provision if the alleged harassment alters, either expressly or

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[7] The memorandum uses the term "agency constraints" without elaboration. Although there was evidence that the term referred to the forty-five day rule, JA 378, 380, apparently the MPD's collective bargaining agreement prohibited an officer's involuntary transfer for disciplinary reasons, the precise request Curry made regarding the glaring. *See* Br. of Appellant at 15; JA 538.

[8] Curry testified that she also reported the glaring to Bigelow but the record does not reflect when or how. JA 285.

constructively, the terms or conditions of an individual's employment. *See, e.g., Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 67–68 (1986). Courts describe an explicit alteration as "*quid pro quo*" harassment and a constructive alteration as "hostile work environment" harassment. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 752 (1998). To be actionable, however, the latter must be severe or pervasive. *Id.*; *Oncale v. Sundowner Offshore Servs., Inc.*, 118 S. Ct. 998, 1002–03 (1998); *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993).

An employer's liability for a hostile work environment sexual harassment claim differs depending on who does the harassing. The harasser can be a supervisor or someone else whose position in the workplace affords authority over the target of the harassment such that the harasser is aided by the "agency relation" in harassing the other employee. *Ellerth*, 118 S. Ct. at 2269; *see Mikels v. City of Durham*, 183 F.3d 323, 331–32 (4th Cir. 1999) ("The fundamental determinant of this form of vicarious liability is not, therefore, the harasser's formal rank vis-a-vis that of the victim in the particular employment hierarchy, . . . but whether the particular conduct was aided by the agency relation.") (internal quotation marks omitted). The United States Supreme Court recently clarified the employer liability standard for supervisory harassment of an employee in *Ellerth* and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).[9] There the Supreme Court further noted that circuit courts had not determined employer liability for co-worker harassment in the same way. *See Faragher*, 524 U.S. at 799. In *Faragher* the Court further noted and declined to disturb the general agreement among circuits that a negligence standard governs employer liability for a co-worker's harassment. *Id.* at 799–801. Every circuit that has addressed co-worker harassment in the "post-

[9] The Supreme Court announced *inter alia* that the employer can be held vicariously liable even if the employer did not know of the harassment. If no "tangible employment action" results from the harassment, the employer may avoid liability by asserting a two-part affirmative defense. *See Ellerth*, 524 U.S. at 764–65; *Faragher*, 524 U.S. at 804–07.

Faragher era" has distinguished the standard applicable to co-worker harassment from that governing harassment by a supervisor, applying to the former a variation of the negligence standard the circuit had applied pre-*Faragher*.[10]

While the reasonableness of an employer's response to sexual harassment is at issue under both standards, the plaintiff must clear a higher hurdle under the negligence standard, where she bears the burden of establishing her employer's negligence, than under the vicarious liability standard, where the burden shifts to the employer to prove its own reasonableness and the plaintiff's negligence. *See Shaw*

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[10] *See Richardson v. New York State Dep't of Correctional Servs.*, 180 F.3d 426, 441 (2d Cir. 1999) (discussing *Faragher* and then concluding "[i]n contrast, if the harasser is the victim's co-worker, the employer will be liable only if it is negligent, that is, if it either provided no reasonable avenue for complaint or knew of the harassment and did nothing about it") (internal quotation marks omitted); *Mikels*, 183 F.3d at 332 (no vicarious liability for co-worker harassment); *Sharp v. City of Houston*, 164 F.3d 923, 929 (5th Cir. 1999) (imposing liability if employer "knew or should have known of the harassment in question and failed to take prompt remedial action" and noting standard "was not disturbed by *Faragher* or *Burlington*"); *Hafford v. Seidner*, 183 F.3d 506, 513 (6th Cir. 1999) (stating "[e]mployer liability for co-worker harassment is based directly on the employer's conduct" and employer is liable if it "knew or should have known of the charged sexual harassment and failed to implement prompt and appropriate corrective action"); *Wilson v. Chrysler Corp.*, 172 F.3d 500, 508 (7th Cir. 1999) ("Liability for co-worker harassment requires a showing of negligence . . . [so] a plaintiff must show that her employer failed to take reasonable steps to discover and remedy the harassment."); *Dhyne v. Meiners Thriftway, Inc.*, 184 F.3d 983, 987 (8th Cir. 1999) (noting distinction between types of harassment and stating "[o]ur court has long recognized that an employer may be directly liable . . . if it knew or should have known of the conduct and failed to take proper remedial action"); *Burrell v. Star Nursery, Inc.*, 170 F.3d 951, 955 (9th Cir. 1999) (employer liable only for what management knew or should have known in co-worker harassment scenario); *Wilson v. Tulsa Junior College*, 164 F.3d 534, 541 n.4 (10th Cir. 1998) (noting distinction between vicarious liability and negligence standard).

v. Autozone, Inc., 180 F.3d 806, 812 n.2 (7th Cir. 1999) ("[T]he reasonableness of the employer's actions in preventing and responding to sexual harassment is relevant under both standards, the difference being who bears the burden of proof."). Indeed, in *Faragher* the Supreme Court reasoned that a supervisor's harassment is both more detrimental (or threatens to be) to the terms and conditions of an individual's employment and more difficult to stop or have stopped than similar behavior by a co-worker. *See Faragher*, 524 U.S. at 803. Moreover, the employer has a greater opportunity to guard against the misconduct of supervisors than that of fellow employees, *see id.*, and, inversely, an employee has a greater opportunity to stop harassment by a co-worker in the first instance. *See id.* ("When a fellow employee harasses, the victim can walk away or tell the offender where to go, but it may be difficult to offer such responses to a supervisor. . . .").

Our circuit has not articulated an employer liability standard for co-worker harassment since the *Faragher* and *Ellerth* decisions nor had it squarely done so before.[11] Consistent with the approach of our sister circuits recognized in *Faragher*, 524 U.S. at 799, we announce the following standard:[12] An employer may be held liable for the harassment of one employee by a fellow employee (a non-supervisor) if the employer knew or should have known of the harassment and

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[11] In *Vinson v. Taylor*, 753 F.2d 141 (D.C. Cir. 1985), the court distinguished, in a footnote, a case involving harassment by a supervisor from those involving harassment by co-workers "who differ radically from supervisors in the scheme of vicarious liability." 753 F.2d at 147 n.45. And in a supervisor harassment case, *Gary v. Long*, 59 F.3d 1391 (D.C. Cir. 1995), we noted without comment the parties' recognition that the negligence standard applies in certain circumstances. 59 F.3d at 1397.

[12] Both parties get the standard wrong, to wit: Curry asserts that the employer liability standard for supervisory harassment applies, Br. of Appellee at 10–14, and the District proposes a modified supervisory harassment standard for co-worker harassment, Br. of Appellant at 28–31.

failed to implement prompt and appropriate corrective action.[13]

Curry's complaint specified two kinds of harassment for which we must determine whether a reasonable jury could find that the District knew or should have known of the harassment and failed to implement prompt and appropriate corrective action.[14] The first occurred from May 1994 to mid-

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[13] The district court's jury charge used a negligence standard: "Plaintiff must prove that management level employees knew or should have known of the alleged sexual harassment . . . and failed to take immediate and appropriate corrective action." JA 742–43. Delay inherent in personnel actions, however, particularly in large organizations, does not necessarily render an otherwise reasonable response inadequate. *See Waymire v. Harris County*, 86 F.3d 424, 429 (5th Cir. 1996) ("[I]n analyzing the promptness of response it is important to keep in mind the entity's lines of command [and] organization format.") (internal quotation marks omitted); *see also Dhyne*, 184 F.3d at 988 ("An employer must be allowed some time to gauge the credibility of the complainant and the seriousness of the situation if we are to observe the Supreme Court's caution that Title VII is not 'a general civility code for the American workplace.' ") (quoting *Oncale*, 118 S. Ct. at 1002).

[14] Given the differences in Freeman's behavior (explicitly sexual verbal harassment at first and silent "glaring" subsequently) and, more important, the manner in which Curry handled each (Curry applied self-help to the verbal harassment and reported it after it had ceased while she waited more than one year before complaining about the glaring), we believe each kind of harassment, and the District's responses thereto, should be analyzed separately. *Cf. Sabree v. United Bhd. of Carpenters and Joiners Local No. 33*, 921 F.2d 396, 401–02 (1st Cir. 1990) (no continuing violation because plaintiff "believed, at every turn, he was being discriminated against" but failed to file timely claim for earlier incidents); *Rush v. Scott Specialty Gases, Inc.*, 113 F.3d 476, 483 (3d Cir. 1997) (continuing violation where harassment intensified after plaintiff filed EEOC charge); *see generally West v. Philadelphia Elec. Co.*, 45 F.3d 744, 755–56 (3d Cir. 1995) (in determining continuing violation *vel non*, court considered similarity, continuity and frequency of offensive conduct and whether harassment caused discrete event triggering duty to assert rights); *Berry v. Board of*

August 1994 and consisted of Freeman's blatantly sexual remarks. No supervisor ever heard them. Neither Curry nor anyone else made them known to a supervisor or EEO official until after the conduct had ceased. Although a reasonable jury could have found from the evidence that Curry's workplace was filled with sexual banter, that fact alone cannot support a finding that the District should have known of Freeman's harassment of Curry, especially in the absence of any similar problems or complaints. The District had in place a policy against harassment, it had made its policy known and it had established an effective complaint procedure. The District, therefore, was entitled to rely on its employees to bring problems with their co-workers to its attention.

Once Curry reported the harassment, the District responded quickly and reasonably. Major advised EEO Officer Peacock of Curry's complaint even before Curry lodged a formal complaint and Peacock began her investigation immediately. Major also admonished Freeman that, if he was harassing Curry, he was to stop immediately. The probable cause finding four months later led to a similar warning by Captain Dreher, the head of the Intelligence Unit. Although the District took no formal disciplinary action, the clear, prompt admonitions were appropriate and, at least for this conduct, effective. Accordingly, we conclude that the evidence supporting the verdict as to Freeman's verbal harassment occurring between May and August 1994 was, at most, "merely colorable," *Smith*, 135 F.3d at 782, and we therefore reverse the district court's denial of the District's motion for judgment as a matter of law to the extent it encompasses that conduct.[15]

Supervisors, 715 F.2d 971, 981 (5th Cir. 1983) (setting forth three factors for determining if plaintiff alleges continuing violation: (1) subject matter; (2) frequency; and (3) degree of permanence which, *inter alia*, may trigger plaintiff's duty to assert rights).

[15] Judge Wald is "puzzled" by this statement (Op. of Wald, J. at 1) and is "unclear what exactly the panel is reversing, and why." (*Id.* at 1.) The jury verdict necessarily determined the District's

According to Curry, the second type of harassment began when the first ended. Thus, from mid-August 1994 until her transfer in June 1996, Curry experienced sexual harassment in the form of Freeman's glaring at her.[16] Neverthe-

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liability for the verbal sexual harassment. The district court then denied the District's motion for judgment as a matter of law and, to the extent its denial reaffirmed the District's liability for the verbal sexual harassment, we reverse that denial—in short the District is not liable to the plaintiff for the verbal sexual harassment because it had no notice of the conduct until after the conduct had ceased. Its response once it learned of the conduct was appropriate as a matter of law. The District *is* liable, however, for the subsequent nonverbal harassment, and we therefore partially affirm the district court's denial of the District's post trial motion, because we cannot conclude as a matter of law that the District's response was appropriate once it learned of the nonverbal harassment.

[16] Although the District, in its post-trial motion below, disputed the hostile work environment finding based on Freeman's glaring JA 808, it does not raise the issue on appeal. If it had, this appeal might have been disposed of at an earlier analytical stage, namely, in determining whether the conduct is sufficiently severe to create a hostile work environment. "Discriminatory conduct results in a hostile work environment when it is so severe or pervasive that it create[s] a work environment abusive to employees because of their race, gender, religion, or national origin, thus offending Title VII's broad rule of workplace equality." *Park v. Howard Univ.*, 71 F.3d 904, 906 (D.C. Cir. 1995) (quoting *Harris*, 510 U.S. at 22) (internal quotation marks omitted). In determining if the plaintiff satisfies this requirement, the court must consider all of the circumstances, including "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Harris*, 510 U.S. at 23. Other courts have held that a co-worker's staring, even when accompanied by physical touching, is not conduct severe enough to alter the terms and conditions of an individual's employment. *See generally Adusumilli v. City of Chicago*, 164 F.3d 353, 357 (7th Cir. 1998) (teasing plaintiff, police department employee, that waving at squad cars makes her look like prostitute, comments to her about bananas, rubber bands and low-neck tops, staring and attempts to make eye

less, Curry *first* brought this harassment to light on November 7, 1995 in response to a supervisor's inquiry. Until then, the District reasonably believed all problems between Curry and Freeman had been resolved. She never filed a formal complaint regarding Freeman's glaring. In response to the complaint Curry did voice to Simpson–Jones over the telephone, however, an EEO officer (Bigelow) simply told Freeman about the complaint, warned him against the objectionable conduct (which he denied) and requested that he voluntarily transfer. EEO Director Wilmore then sent Curry a memorandum informing her the only available remedy was her own transfer. In view of this evidence, especially the fact that Freeman by this point was a "repeat offender," *see Adler v. Wal–Mart Stores, Inc.*, 144 F.3d 664, 676 (10th Cir. 1998),[17] we cannot say that "the evidence and all reasonable inferences that can be drawn therefrom are so one-sided that reasonable men and women could not disagree" on the adequacy of the District's response once it knew of Freeman's glaring. *Smith*, 135 F.3d at 782. We therefore affirm the district court's denial of the District's motion for

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contact and four isolated incidents in which co-worker briefly touched plaintiff's arm, fingers or buttocks fall within the "safe harbor for employers"); *Shepherd v. Comptroller of Pub. Accounts*, 168 F.3d 871, 874 (5th Cir. 1999) (stares and arm touching were not severe where none was physically threatening or likely to undermine reasonable plaintiff's workplace competence).

[17] "The employer is, of course, obliged to respond to any repeat conduct; and whether the next employer response is reasonable may very well depend upon whether the employer progressively stiffens its discipline, or vainly hopes that no response, or the same response as before, will be effective." 144 F.3d at 676; *see also Carter v. Chrysler Corp.*, 173 F.3d 693, 702 (8th Cir. 1999) ("Factors in assessing the reasonableness of remedial measures may include the amount of time that elapsed between the notice and remedial action, the options available to the employer, possibly including employee training sessions, transferring the harassers, written warnings, reprimands in personnel files, or termination, and *whether or not the measures ended the harassment*.") (citations omitted) (emphasis added).

judgment as a matter of law with regard to Freeman's glaring.[18]

B.

The District challenges the district court's denial of its post-trial motion requesting, in the alternative, remittitur of the $100,000 damages award. *See* 9 F. Supp. 2d at 4. We order remittitur only where, after a "detailed appraisal" of the evidence bearing on damages, we find the award grossly excessive. *See Grunenthal v. Long Island R.R. Co.*, 393 U.S. 156, 159 (1968). An award is grossly excessive if "it is so

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[18] In addition to challenging liability, the District appeals the trial court's admission into evidence of portions of the DHR probable cause report. Curry disputes that the District preserved its objection below, Br. of Appellee at 16, and the record is unclear on the issue. *Compare* Reply Br. at 18 *and* JA 6–32 *with* JA 149–56, 371–77. Assuming *arguendo* the District properly objected below, its objection was based on Rule 403, Federal Rules of Civil Procedure, and we believe the district court's reasons are sufficient for us to conclude that it did not abuse its discretion in admitting the evidence. *See* 9 F. Supp. 2d at 3–4.

The District also challenges the district court's failure to charge the jury that an employee who at one time has a consensual intimate relationship with a co-worker is obliged to tell the co-worker that advances are no longer welcome. Whether familiarity of a sexual nature is "unwelcome" is a question of fact. *See Meritor*, 477 U.S. at 68 ("[T]he question whether particular conduct was indeed unwelcome ... turns largely on credibility determinations committed to the trier of fact, ... [and t]he correct inquiry is whether respondent by her conduct indicated that the alleged sexual advances were unwelcome...."). Here, the district court properly presented to the jury Curry's and Freeman's past history as a factor for it to consider in determining harassment *vel non*. JA 743 ("The Defendant contends that Detective Curry had engaged in welcome sexual conduct with Detective Freeman and therefore, she had a burden to inform the District when the conduct became unwelcome, which she failed to do."). The lapse of time between the end of their relationship and the alleged harassment, coupled with Freeman's persistence in spite of Curry's unresponsiveness, are sufficient to support a finding of harassment.

inordinately large as obviously to exceed the maximum limit of a reasonable range within which the jury may properly operate." *Langevine v. District of Columbia*, 106 F.3d 1018, 1024 (D.C. Cir. 1997) (quoting *Williams v. Stewart Motor Co.*, 494 F.2d 1074, 1085 (D.C. Cir. 1974)). We allow remittitur, however, "only if the reduction permits the highest amount the jury tolerably could have awarded." *Langevine*, 106 F.3d at 1024 (quoting *Carter v. District of Columbia*, 795 F.2d 116, 135 n.13 (D.C. Cir. 1986)) (internal quotation marks omitted).

The jury's liability verdict itself reveals the district court's legal error in denying a new trial on damages. As the trial court's order makes clear, the court and the jury considered the harassment beginning in May 1994, which consisted of the "lizard" remarks, as well as the glaring that began some three months later. With the District's liability limited to the "glaring" harassment, Curry's damages must likewise be limited: she can recover only for the glaring that occurred after she reported it on November 7, 1995 and continued until her departure in June 1996. At trial, however, the damages evidence covered, as the district court emphasized, *see* 9 F. Supp. 2d at 4, a two year period as opposed to the eight months for which the District can be held liable. Moreover, Curry's physical problems, including acne, nightmares, headaches, loss of appetite and accompanying weight loss, occurred sometime in 1994, nearly one full year, if not more, before she reported the glaring. The corroborating testimony of both Curry's sister and Curry's prayer partner, which described a "dramatic change in [Curry's] appearance and behavior," 9 F. Supp. 2d at 4, related to late 1994.[19]

Curry's damages evidence also included the testimony of her pastor and her supervisor after she transferred to the Court Intelligence Unit in June 1996. Curry's pastor, Reverend Thomas J. Baltimore, testified that he had counseled her for more than three years. The two worked "through a

[19] Although her sister testified that Curry's acne was "just now starting to clear," JA 426, Curry testified only to physical problems that developed "when [the harassment] first started occurring." JA 170.

number of crises" which, apart from the workplace harassment, included her father's death and "conflicts" with other family members and fellow church members. JA 477–78. Baltimore testified that he continued to counsel Curry, who "worries [him] to death." JA 477. William E. Wagner, her supervisor after she transferred, testified that Curry was emotionally upset in July 1996, manifested by her difficulty in concentrating and sitting still and by "paranoi[a] in her work."[20] JA 472. Curry eventually told him that her problems related to the pending sexual harassment litigation. Curry also testified that she was reluctant to seek counseling from a psychiatrist or psychologist because she feared it would jeopardize her eligibility to obtain a higher level of security clearance which she eventually attained.

In my view, the damages award exceeds "the maximum limit of a reasonable range" of damages for Freeman's glaring harassment which occurred over a period of eight months and caused Curry some degree of emotional upset. Although Freeman and Curry apparently had nearby offices during that time, they no longer worked together. Assuming the glaring occurred every time Curry saw Freeman, her contact with him was isolated, incidental to her law enforcement duties and passing. On these facts, I believe that an award of $100,000 in damages is grossly excessive. *See, e.g.*, *Hutchinson v. Stuckey*, 952 F.2d 1418, 1422 (D.C. Cir. 1992) ($50,000 was excessive for permanent "significant injury" to finger); *Johnson v. Parrish*, 827 F.2d 988, 991 (4th Cir. 1987) ($150,000 was excessive for partially disabling neck and arm injury).

III.

For the foregoing reasons, the district court's denial of the District's motion for judgment as a matter of law or, in the

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[20] Wagner described Curry's paranoia as follows: "She would do something and immediately bring it to me for approval to see if it was done properly. Overly to the point where I spent a lot of time just overlooking her work that she did because she would keep bringing it to me." JA 472.

alternative, for a new trial or remittitur is affirmed in part, that is, as it relates to the District's liability for the sexual harassment Curry first reported in November 1995. With regard to the District's liability for harassment occurring before that date, the district court's denial of the motion for judgment as a matter of law is reversed. I would remand the damages award to the district court for further proceedings consistent with this opinion. *See Hutchinson*, 952 F.2d at 1423 n.5.

WALD, *Circuit Judge*: The Supreme Court recently defined negligence by an employer in the Title VII context: "An employer is negligent with respect to sexual harassment if it knew or should have known about the conduct and failed to stop it." *Burlington Indus. v. Ellerth*, 524 U.S. 742, 759 (1998). There is ample evidence in this record to support the jury's verdict that the District of Columbia was negligent in not stopping the sexual harassment of Det. Cynthia Curry by Det. Condwell Freeman, and that because of its negligence Curry suffered $100,000 worth of damages.

At the outset, I agree with my colleagues that no finding of liability could be sustained against the District based solely on its conduct in the period May–August 1994, since there is not sufficient evidence on this record that the District was on notice of Freeman's harassing behavior until Curry's complaint in September 1994.[1] I am somewhat puzzled, however, by my colleagues' statement that "we . . . reverse the district court's denial of the District's motion for judgment as a matter of law to the extent it encompasses that conduct." Henderson Op. at 11. The district court was quite clear in its denial of the District's motion for judgment as a matter of law (j.m.l.) that "[t]here was sufficient evidence introduced at trial that would support a finding of continued harassment *after the time Defendant claims it had notice.*" *Curry v. District of Columbia*, 9 F. Supp. 2d 1, 3 (D.D.C. 1998) (emphasis added). Since there is no reason to believe the district court's order was based on faulty analysis, I am unclear what exactly my colleagues are reversing, and why.

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[1] This is not to say, of course, that actual notice is always required to hold an employer liable for co-worker sexual harassment under Title VII. *See, e.g., Williamson v. City of Houston*, 148 F.3d 462, 465 (5th Cir. 1998) ("[c]onstructive notice can result from showing the pervasiveness of the harassment.") (internal quotation marks omitted); *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 644, 673 (10th Cir. 1998) ("[M]any courts have held that the pervasiveness of sexual harassment can properly lead to an inference of knowledge."); *Hall v. Gus Constr. Co.*, 842 F.2d 1010, 1016 (8th Cir. 1988) (incidents of harassment so numerous that employer held liable for not discovering and ending harassment).

It appears that my colleagues, the district court, and I all agree that the District can be found liable for harassment which occurred after it had notice. *See* Henderson Op. at 9–10, 11–12 n.15. The only question before us then is whether the damages the jury awarded Curry are "beyond all reason or so great as to shock the conscience. Courts may not set aside a jury verdict merely deemed to be generous; rather, the verdict must be so unreasonably high as to result in a miscarriage of justice." *Langevine v. District of Columbia*, 106 F.3d 1018, 1024 (D.C. Cir. 1997) (internal quotation marks and citation omitted). In my view, the jury's award of $100,000 to a police officer who suffered years of harassment does not remotely qualify as a miscarriage of justice, whether Curry can recover for damages incurred before November 7, 1995, as I would find, or only for damages incurred after that date, as my colleagues find.

"[T]he jury's verdict will withstand challenge unless the evidence and all reasonable inferences that can be drawn therefrom are so one-sided that reasonable men and women could not disagree on the verdict." *Swanks v. WMATA*, 179 F.3d 929, 933 (D.C. Cir. 1999) (quotation marks omitted). I believe on the evidence in the record a reasonable jury could have found the following facts.

Curry was harassed continually from May 1994 until she transferred out of her unit in June 1996. At first, the harassment took the form of daily requests for sexual favors, which Curry testified she told Freeman were not appreciated.[2] After Curry brought this verbal harassment to her supervisor's attention, he went to Freeman and asked him "to stop whatever you are doing to Cindy." J.A. at 786. Freeman then threatened to sue Curry if she pursued a harassment complaint, and said he would "take [her] home and [her] automobile." J.A. at 779. Freeman stopped making his daily requests for sex, but instead began to harass her by glaring

[2] Curry stated she did not complain at first about Freeman's behavior because, based on what she had seen happen to other female police officers, she did not think it would be good for her career if she complained. She seems to have been prescient in that regard.

at her in an intimidating way and by staring at her as if he were mentally undressing her.[3] After a month or two of this behavior, Curry sought a transfer out of her office to avoid Freeman.

The Metropolitan Police Department investigated Curry's complaint and concluded that there was probable cause that Freeman was verbally harassing Curry. However, the Department was unable to take any action against Freeman because its investigation took roughly four months, and then-D.C. law prohibited disciplining an MPD employee more than 45 working days after the Department had notice of the cause for discipline. MPD could not even transfer Freeman to another unit without his consent, which he declined to give. Freeman's supervisor testified that he did not learn the

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[3] I disagree with the gratuitous dicta in Judge Henderson's opinion that Freeman's glares may not have been sufficiently severe to be actionable under Title VII. *See* Henderson Op. at 12–13 n.16. Whether harassing behavior was sufficient to create a hostile work environment is an intensely fact-based question. *See Howard v. Burn Bros.*, 149 F.3d 835, 840 (8th Cir. 1998) ("Once there is evidence of improper conduct and subjective offense, the determination of whether the conduct rose to the level of abuse is largely in the hands of the jury."); *Paroline v. Unisys Corp.*, 879 F.2d 100, 105 (4th Cir. 1989) ("Whether Moore's harassment was sufficiently severe or pervasive is quintessentially a question of fact."), *vacated in part on other grounds*, 900 F.2d 27 (4th. Cir. 1990) (en banc). The fact that other courts have found harassing behavior which included staring not to be actionable does not establish any sort of generalization that "a co-worker's staring, even when accompanied by physical touching, is not conduct severe enough" to be actionable. Henderson Op. at 12 n.16. There was ample evidence presented that Freeman's harassment affected Curry's ability to work, and it is far from clear that no reasonable person would have been affected by Freeman's intimidation tactics. *Cf. Shepherd v. Comptroller of Pub. Accounts*, 168 F.3d 871, 874 (5th Cir. 1999) (finding boorish behavior not actionable because it did not undermine plaintiff's workplace competence); *see also Saxton v. American Tel. & Tel. Co.*, 10 F.3d 526, 536 n.18 (7th Cir. 1993) (mere presence of an employee who has engaged in particularly severe harassment can create hostile work environment); *Ellison v. Brady*, 924 F.2d 872, 883 (9th Cir. 1991) (same).

results of the Department's investigation of Freeman until trial, and expressed his view that "[i]t would gain the Department nothing for me to know" that the investigation had found probable cause that Freeman was harassing Curry. J.A. at 537. Similarly, a year later, when Curry complained about the constant glaring she was experiencing, the MPD told her that it was unable to do anything to help her.[4] Meanwhile, Curry was ostracized as a result of the complaints she filed.

Given this record evidence, I cannot credit my colleague's confident assertion that the District "had established an effective complaint procedure." Henderson Op. at 11. The record shows that the only results of Curry's two complaints made a year apart were requests that Freeman stop harassing Curry (which did not stop the harassment), an investigation which substantiated Curry's allegations (but whose results were never shared with Freeman's supervisor), and the ostracism of Curry.[5]

This meager response is not, in my view, consistent with what courts have required of a reasonable employer under Title VII. "Title VII requires more than a mere request to refrain from discriminatory conduct." *Ellison v. Brady*, 924

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[4] An officer did ask Freeman to stop harassing Curry, but that request had no effect.

[5] In its effort to support the notion that the District acted "quickly and reasonably," Judge Henderson's opinion considerably overstates the evidence about what Freeman's supervisors said to him. *See* Henderson Op. at 11. Far from issuing "clear, prompt [and effective] admonitions," *id.*, Freeman's supervisors merely indicated in general terms that sexual harassment was not acceptable, and that *if* it was going on it should stop. *See* J.A. at 340–43, 496. There was no evidence that once the MPD concluded that Freeman had been harassing Curry it said anything more serious to him. In fact, the Department did not think it necessary to share the results of the investigation with Freeman's supervisor. Further, I do not consider the "admonitions" to have been effective or adequate, since their only apparent effect was to convert Freeman's harassment from verbal requests for sex into silent but intimidating, sexually evaluative stares.

F.2d 872, 882 (9th Cir. 1991). Where evidence of harassment exists, an employer cannot avoid liability by simply making known a general policy against harassment. *See Jackson v. Quanex Corp.*, — F.3d —, —, 1999 WL 707766 at *17 (6th Cir. Sept. 9, 1999); *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 676 (10th Cir. 1998) ("Courts have explained that simply indicating to a perpetrator the existence of a policy against harassment is usually insufficient."); *cf.* J.A. at 342–43 (Capt. Dreher testifying that "in the aftermath" of Curry's complaint, he "let it be known verbally to my officials to pass along that it wouldn't be tolerated in the workplace"). This court has previously found that agency managers should "promptly take all necessary steps to investigate and correct any harassment, including warnings and appropriate discipline directed at the offending party." *Bundy v. Jackson*, 641 F.2d 934, 947 (D.C. Cir. 1981) (Wright, J.); *accord Yamaguchi v. United States Dep't of the Air Force*, 109 F.3d F.3d 1475, 1482 (9th Cir. 1997) (remedial measures must be reasonably calculated to end the current harassment and to deter future harassment).

It is undisputed that Freeman was never disciplined for his harassment. At the very least, a reasonable juror could conclude that the failure to take any action against Freeman for his verbal harassment contributed to Freeman's decision to continue to harass Curry by staring at her. "Employers send the wrong message to potential harassers when they do not discipline employees for sexual harassment." *Ellison*, 924 F.2d at 882. "Title VII does not permit employers to stand idly by once they learn that sexual harassment has occurred. To do so amounts to a ratification of the prior harassment." *Fuller v. City of Oakland*, 47 F.3d 1522, 1529 (9th Cir. 1995). "In such instances, the combined knowledge and inaction may be seen as demonstrable negligence, or as the employer's adoption of the offending conduct and its results, quite as if they had been authorized affirmatively as the employer's policy." *Faragher v. City of Boca Raton*, 524 U.S. 775, 789 (1998). Thus I believe that under precedent from the Supreme Court, this court, and our sister circuits, the District could be held liable for failing to take action to

deter future harassment once it had knowledge of the harassment in September 1994.

A reasonable juror, admittedly, might have concluded that the District's "admonitions" were sufficient to deter future harassment. *Compare Yamaguchi*, 109 F.3d at 1483 ("[T]o avoid liability an employer must take at least some form of disciplinary action against a harassing co-worker . . . ."), *with Knabe v. Boury Corp.*, 114 F.3d 407, 412 n.8, 414 (3d Cir. 1997) (remedy may be adequate as a matter of law even where it fails to stop harassment, so long as it could reasonably have been expected to deter harassment; punitive action not always necessary). But surely a reasonable juror would not be compelled to reach that conclusion. *See, e.g., Adler*, 144 F.3d at 676 ("Repeat conduct may show the unreasonableness of prior responses."); *Paroline v. Unisys Corp.*, 879 F.2d 100, 106–07 (4th Cir. 1989) (reasonable fact finder could conclude that severe warning, delayed salary increase, and similar punitive measures not adequate remedies), *vacated in part on other grounds*, 900 F.2d 27 (4th Cir. 1990) (en banc).

My colleagues override the jury and the district court in finding that the District cannot be held liable for harassment occurring between September 1994 and November 1995 by viewing the two phases of Freeman's harassment, the verbal phase and the staring phase, as totally separate and unconnected. It is of course possible that a reasonable juror could also view the situation in such a fragmented way, so that Curry's complaint about the verbal aspect of Freeman's behavior provided no notice to the District that Freeman might continue to harass her in other ways, and thus the District had no remedial obligation following notice of the verbal harassment because it did not recur in that precise form. *But cf. Fuller*, 47 F.3d at 1529 (city always has obligation to take remedial actions against harasser once it learns of harassment); *Paroline*, 879 F.2d at 107 (employer's knowledge of prior harassment sufficient to impute liability for later harassment in the absence of adequate remedial measures).

However, it certainly cannot be assumed that all reasonable jurors would have to view the evidence of harassment in that compartmentalized way. In fact, it does not appear the MPD itself understood Curry's complaint about glaring as completely separate from the earlier harassment. If it had, then nothing would have barred the Department from disciplining Freeman for the glaring—because the 45–day clock was triggered only when the Department learned of a reason for discipline. Yet, when Curry complained that Freeman's glaring was creating a hostile work environment, the MPD told her, in less than 40 days, that it was unable to take any action to solve the problem. The only reasonable explanation for that powerlessness is that the Department was already on notice of Freeman's behavior, but had failed to act within 45 days.[6] Thus, the MPD believed that Freeman could not be transferred in December 1995, because the MPD had been on notice of his harassment since September 1994. But yet my colleagues say that Curry cannot recover for pre-November 1995 damages, because the MPD was *not* on notice of Curry's ongoing problems with Freeman until November 1995. That result may make sense to my colleagues, but surely not every reasonable juror would be compelled to so conclude.

My colleagues also assert that the District could not reasonably be faulted during the period when the verbal harassment had ceased and Curry had not yet complained to anyone of the staring. But I do not believe that Title VII law supports such a demarcation between the two types of harassment such that the District's obligation to monitor the type of harassment it knew about necessarily stops at the line

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[6] Judge Henderson suggests the possibility that it was the MPD's collective bargaining agreement (CBA) that prevented the transfer of Freeman in December 1995. *See* Henderson Op. at 6 n.7. However, Lt. Peacock's testimony was that the CBA prevented the MPD from transferring an officer as an alternative to discipline, *where discipline was barred by the 45–day rule*. *See* J.A. at 311–12. Where the 45–day rule was not a barrier to discipline, Sgt. Major testified that transfer of the offending officer was the usual practice when there was probable cause to believe one officer had sexually harassed another officer. *See* J.A. at 537–38.

where a new kind of harassment begins. The District was on notice that an identified employee had been harassing a co-worker; it may therefore be held responsible for failing to prevent the continuation of that harassment, whether in the same form or a different form, and whether reported or not. *See Sharp v. City of Houston*, 164 F.3d 923, 931 (5th Cir. 1999) (police department liable for harassment despite lack of complaint by plaintiff where officer had made harassing remarks in past to other women officers; "despite having been put on notice that [he] might be a problem, [the department] had made no effort to supervise or constrain his behavior"); *Hirase-Doi v. U.S. West Communications, Inc.*, 61 F.3d 777, 784 (10th Cir. 1995) (prior harassment of other women can serve as sufficient notice to hold employer liable for harassing conduct of co-worker); *Paroline*, 879 F.2d at 107 (same); *Yates v. Avco Corp.*, 819 F.2d 630, 635–36 (6th Cir. 1987) (fact that company was aware that supervisor had harassed women in past and took no remedial action could establish constructive notice of later harassment because it was evidence of harassing tendencies and of the failure of company's anti-harassment policy).

Finally, I believe my colleagues misunderstand the extent of an employer's liability for co-worker harassment. Judge Henderson's opinion appears to suggest that an employer's liability only extends to the harassment which occurred after the point at which it had knowledge. But that is not what the cases say. *See Fuller*, 47 F.3d at 1529 (employer who fails to take appropriate remedial action after notice liable for past harassment even where harassment stopped after employer received notice); *see also Knabe*, 114 F.3d at 413–14 (considering whether employer's response was sufficiently reasonable to avoid liability despite fact that plaintiff had quit the day employer responded to her complaint). In fact, the Supreme Court has also indicated that an employer's failure to remedy harassment may constitute ratification of past harassment: "[T]he combined knowledge and inaction may be seen as . . . the employer's adoption of the offending conduct and its results, quite as if they had been authorized affirmatively as the employer's policy." *Faragher*, 524 U.S. at 789;

accord Fuller, 47 F.3d at 1529 (employer's failure to act "amounts to a ratification of the prior harassment"). Thus, regardless of the District's knowledge *vel non* of Freeman's harassment prior to November 7, 1995, its failure to act after that date could be found to constitute "adoption" of Freeman's conduct up to that point.[7]

In the end, we have before us here a classic case of harassment. The evidence shows that Curry was harassed on a continuous basis from May 1994 until June 1996, with only partial relief occasioned by her repeated efforts to transfer away from Freeman, which were temporarily successful in 1995 and finally successful in 1996. The MPD knew of Curry's allegations in September 1994, and concluded they were justified in January 1995. However, MPD was prohibited from doing anything to effectively address the problem by the 45-day rule, so the only actions ever taken in response were vague requests that if harassment were going on, it should stop. Unsurprisingly, given these circumstances, the harassment did not stop, although it changed to a more subtle form. This case falls squarely within *Ellerth*: "An employer is negligent with respect to sexual harassment if it knew or should have known about the conduct and failed to stop it." 524 U.S. at 759; *see also Faragher*, 524 U.S. at 789 ("[c]ombined knowledge and inaction may be seen as demonstrable negligence . . . ."). Thus, I cannot agree with my colleagues that Curry can recover only for harassment which occurred after November 7, 1995.

In sum, I believe that the jury would have been fully justified in awarding Curry compensation for damages suffered before November 1995. But, more than that, I do not believe that the award of $100,000 was excessive, even adopt-

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[7] There is no reason why this approach is inconsistent with Title VII's " 'primary objective' " of preventing harassment, *Faragher*, 524 U.S. at 806, since an employer who acts appropriately once it has knowledge will never be liable. On the contrary, it would be strange if the particular date on which an employee made a futile complaint had significance for the amount of damages for which she could recover.

ing my colleagues' view that compensable damages could only accrue beginning in November 1995.[8] Judge Henderson states that "the jury considered the harassment beginning in May 1994." Henderson Op. at 15. The jury returned a general verdict. There is simply no evidence in the record as to when the jury found that damages began to accrue, and this court is required to uphold the jury's verdict if there is any reasonable basis for it.[9] Judge Henderson's opinion appears to assume that because the jury heard evidence of damages dating back to 1994, the jury's damage award was based on the period 1994–1996, and therefore the jury would have awarded less had it confined itself to the period after November 1995. This inference is irrelevant to our review of a jury verdict. We do not sit to second-guess the jury; we can only order remittitur if the verdict is "beyond all reason." *Langevine*, 106 F.3d at 1024. A reasonable jury could well have found that the harassment which occurred from November 1995 to June 1996, when Curry left the unit, caused Curry to suffer $100,000 in damages, especially when viewed against the backdrop of Freeman's prior harassment.

Similarly, Judge Henderson's opinion appears to place great weight on the fact that Curry's physical problems began to manifest themselves in 1994, "nearly one full year, if not more, before she reported the glaring." Henderson Op. at 15. The fact that Curry had suffered prior to November in no way detracts from her damages from November onward. Curry testified she had nightmares and felt the need to sleep

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[8] It is not at all clear on what basis Judge Henderson's opinion asserts, without citation to the record, that Curry's contact with Freeman after November 1995 was "isolated, incidental ... and passing." Henderson Op. at 16. Freeman testified that during this time his office was roughly 25 feet from her desk. J.A. at 592. I do not see how that fact supports an inference that the two had merely isolated and passing contact with one another, particularly given our deferential standard of review for a jury verdict. *See Swanks v. WMATA*, 179 F.3d 929, 933 (D.C. Cir. 1999).

[9] Thus, there is no basis in the record for the assertion that "[t]he jury verdict necessarily determined the District's liability for the verbal sexual harassment." Henderson Op. at 11–12 n.15.

with her gun next to her pillow. Her skin broke out, she had headaches, and lost her appetite. Other witnesses testified that she became extremely nervous and would call her sister almost every night, very late, crying.

Moreover, I can find no evidence to support the suggestion that damages ceased to accrue in June 1996. *See* Henderson Op. at 15 (evidence on damages went beyond "the eight months for which the District can be held liable"). William Wagner supervised Curry after her transfer in June 1996, and he testified that, even in the absence of Freeman, she was "really emotionally upset." J.A. at 470. "[S]he was having problems concentrating with the things that I was trying to discuss with her, almost to the point that she was in tears." *Id.* at 471. Curry's sister testified that Curry's skin problems were, in March 1998, "just now starting to clear." *Id.* at 426. Curry's sister also testified that Curry's face was still "drawn in ... this is not what my sister looked like [before 1994]." *Id.* at 427. Similarly, her pastor testified that he had been counseling her, trying to help her regain her confidence, from late 1994/early 1995 at least until trial in March 1998.

The question then that the jury had to decide was what amount would compensate Curry for the damage she suffered from Freeman's harassment that can be attributed to the District's negligence. There was substantial evidence before the jury that Curry's damages continued until the time of trial, and perhaps have continued to this day. *Cf. id.* at 806 (court instructing jury that it could award damages for "emotional and mental anguish and anxiety the Plaintiff has suffered *or will continue to suffer*") (emphasis added).

"A court must be especially hesitant to disturb a jury's determination of damages in cases involving intangible and non-economic injuries." *Langevine*, 106 F.3d at 1024. I see no basis for concluding that an award of $100,000 for eight months of harassment and years of stress is "beyond all reason." *Cf. id.* ($200,000 for largely emotional distress damages from false arrest not excessive); *Smith v. Northwest Fin. Acceptance, Inc.*, 129 F.3d 1408, 1417 (10th Cir. 1997)

($200,000 emotional distress damages not excessive where plaintiff's symptoms included headaches, sleeplessness, and frequent crying); *Kientzy v. McDonnell Douglas Corp.*, 990 F.2d 1051, 1062 (8th Cir. 1993) (damages of $125,000 for past emotional distress and $25,000 for future emotional distress from discriminatory discharge not excessive); *see also Ruiz v. Gonzalez Caraballo*, 929 F.2d 31, 34 (1st Cir. 1991) ("[T]ranslating legal damage into money damages—especially in cases which involve few significant items of measurable economic loss—is a matter peculiarly within a jury's ken.") (quotation marks omitted).

In sum, I do not believe that Curry could only recover damages which accrued after November 7, 1995. Even if I did, however, I would still find the jury's verdict a sustainable and reasonable one.

For these reasons, I would affirm the district court's decision in its entirety and I concur in the decision not to require remittitur of the jury verdict.

RANDOLPH, *Circuit Judge, concurring*: I join all of Judge Henderson's opinion except for Part II–B. For the reasons given by Judge Wald regarding the period after October 1995, I agree that the jury's award of $100,000 must be sustained.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CYNTHIA D. CURRY,
Plaintiff,

v. Civil Action No. 97-1088

DISTRICT OF COLUMBIA,
Defendant.

FILED
June 3, 1998
Nancy Mayer-Whittington, Clerk
U.S. District Court

MEMORANDUM OPINION

This matter comes before the Court on (1) Defendant's motion for judgment as a matter of law, or, in the alternative, for a new trial or remittitur; and (2) Plaintiff's motion for attorneys fees and costs.

When considering Defendant's motion for judgment as a matter of law or new trial, the Court must examine the facts in the light most favorable to Plaintiff. See Morgan v. District of Columbia, 824 F.2d 1049, 1056 (D.C. Cir. 1987). In this case, the facts the jury could have found are as follows:

Plaintiff Cynthia Curry was employed by the Metropolitan Police Department ("MPD") in the Security Squad, Intelligence Unit. Detective Freeman, also an employee of the MPD, was a 26-year veteran of the Domestic Security Squad in the Intelligence Unit. In October, 1992, Plaintiff first met Detective Freeman when she began to work in the Intelligence Unit of the MPD. Between October 1992 and April 1993, Plaintiff and Detective Freeman engaged in a six month romantic relationship that including dating and consensual

sexual intercourse. After their relationship ended around April, 1993, Detective Freeman began to harass Plaintiff by telling her sexual jokes, and suggesting that Plaintiff allow him to "slip her the lizard" while grabbing his crotch. (Detective Freeman had referred to his penis as his "lizard").

In September 1994, Plaintiff told Detective Freeman's supervisor, Sergeant Majors, that Detective Freeman had been sexually harassing her. Sergeant Majors referred Plaintiff to the MPD Labor Relations Office. On September 30, 1994, Plaintiff filed a complaint at the MPD's EEO office and an investigation of Plaintiff's complaints was undertaken.

Sergeant Majors asked Detective Freeman about Plaintiff's allegations, and Detective Freeman denied them. Consistent with MPD policy, Sergeant Majors advised Detective Freeman that sexual harassment would not be tolerated. After Sergeant Majors spoke to Detective Freeman, there was no more verbal contact between Plaintiff and Detective Freeman. However, Plaintiff stated that Detective Freeman would glare at her in a harassing manner, making her feel extremely uncomfortable. During this time, Lieutenant Peacock of the MPD Labor Relations Office conducted an investigation into Plaintiff's complaint and concluded that there was "probable cause" that would justify further processing of Plaintiff's complaint. Additionally, the D.C. Human Rights Office conducted an investigation and also found "probable cause" that Detective Freeman sexually harassed Plaintiff. However, under the MPD Labor contract, discipline cannot be taken against an officer more than 45 days after the department becomes aware of improper conduct. Because Lieutenant Peacock's investigation took more than 45 days to complete, no disciplinary action was taken against Detective Freeman. He was left in the Intelligence Unit working in close proximity to the Plaintiff. In June 1996, Plaintiff left the Intelligence Unit.

On May 16, 1997, Plaintiff filed this action in District Court. The case went to trial, and the jury returned a verdict in favor of the Plaintiff for $100,000.

I. Judgment as a Matter of Law

Defendant claims that the jury's verdict should be set aside because the District of Columbia cannot be held liable for Detective Freeman's conduct before it had notice. Defendant claims that it did not have notice because Plaintiff failed to report Detective Freeman's remarks to her supervisor or the MPD Labor Relations Office before August 1994. Defendant claims that after it had notice, it acted appropriately and advised Detective Freeman to stop the harassing conduct. After Detective Freeman was advised, he stopped making harassing jokes and remarks, but began to give Plaintiff long glares. Defendant claims that Freeman's glares did not rise to a level which affected Plaintiff's terms or conditions of employment.

In order to overturn a jury's verdict, the court must find that "the evidence, together with all inferences that can reasonably be drawn therefrom is so one-sided that reasonable men could not disagree on the verdict." Carter v. Duncan-Higgins, Ltd., 727 F.2d 1225, 1227 (D.C. Cir. 1984). The verdict in this case was the result of careful consideration by an eight member jury that paid close attention to the testimony during trial. There was sufficient evidence introduced at trial that would support a finding of continued harassment after the time Defendant claims it had notice. For example, at trial, Plaintiff demonstrated the way that Detective Freeman would glare at her. According to her demonstration, Detective Freeman would walk by her, and slowly and deliberately look her up and down. A reasonable jury could conclude that these glares, combined with the prior history of Detective Free-

man's actions toward Plaintiff, could constitute continuing harassment.

Additionally, the jury could have concluded that the Defendant's corrective action was inadequate. The Defendant took no steps to separate the parties except to afford the Plaintiff the opportunity to leave the Intelligence Unit. In cases such as this, a jury could find that the Defendant should have required Detective Freeman, the harassing party, to move.

The Defendant argued that the 45-day limitation under the MPD labor contract prevented it from taking any additional action against Detective Freeman. The contract, however, was not binding on the jury, for it was overridden by federal civil rights law. Here, the jury could have found a 45-day limitation was not an adequate excuse for the Defendant's failure to take further corrective action on Plaintiff's complaints.

II. Admissibility of the EEO and D.C. Human Rights Reports

Defendant also claims that the jury's verdict should be set aside because the Court erred in admitting the EEO and D.C. Human Rights Reports into evidence. The Court found that the admission of these reports was proper under Fed. R. Evid. 803(8)(c), as a public report, and under Fed. R. Evid. 801(d)(2), as an admission of the Defendant. Defendant claims that the probative value of the reports "is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury" under Fed. R. Evid. 403.

The Court admitted the reports not for the purpose of proving that Detective Freeman had harassed the Plaintiff, but

for the purpose of rebutting Defendant's claim that it took adequate corrective action after receiving notice of Plaintiff's complaints. An employer must take prompt and appropriate action "reasonably calculated to end the harassment." Waltman v. International Paper Co., 875 F.2d 468 (5th Cir. 1989). Here, the Defendant claimed that it had taken the proper corrective measures by investigating Plaintiff's complaints. To permit the Defendant to make this claim but preclude any evidence as to the results of those investigations tells only half the story. The reports are highly relevant evidence to rebut Defendant's claim that it responded adequately to Plaintiff's complaints. The jury had to determine what corrective action would have been adequate in light of the nature of Plaintiff's complaints. In determining the adequacy of corrective action in light of the notice that the Defendant had, the jury had to consider evidence not merely about the existence of some form of notice to the Defendant, but also of the extent of that notice. These reports go directly to that issue, demonstrating that the Defendant had notice not only that Plaintiff was claiming sexual harassment, but also that her complaints were not groundless.

The Court found that the probative value of these reports outweighed their prejudicial. [sic] The Court addressed any potential prejudice by instructing the jury as follows:

> The Plaintiff has introduced evidence that the District's Office of Human Rights and the Metropolitan Police Department's Office of Labor Relations found "probable cause" to believe that Plaintiff was sexually harassed. A "probable cause" finding is not a final determination of guilt; rather, it states an opinion based on the available evidence that the charging party may be able to prove her allegations

during a trial such as the one you have attended. This evidence is the opinion of the director of those offices and is not binding on you. Rather, you are the sole finders of fact in this case and must judge the case based on the evidence as you see it. You should consider the "probable cause" findings in light of all the evidence in the case and come to your own conclusions. (Court's Jury Instruction No. 15).

III. New Trial

Defendant also moves for a new trial. A court may grant a motion for [a] new trial pursuant to Fed. R. Civ. P. 59 if the verdict is "against the clear weight of the evidence, if the damages awarded are excessive, or substantial error occurred during the proceedings." Machesney v. Bruni, 905 F. Supp. 1122, 1130 (D.D.C. 1995). The Court finds that the jury verdict is reasonably supported by the evidence and does not conclude that a new trial in warranted.

IV. Remittitur

Defendant claims because Plaintiff did not prove any lost wages or medical bills in this case, the jury's award of damages in the amount of $100,000 was excessive. "In assessing whether an award is excessive, the Court should determine if the size of the verdict is beyond reason, if it 'shocks the conscience' of the court, or if it represents a 'miscarriage of justice.'" Machesney v. Bruni, 905 F. Supp. 1122, 1131 (D.D.C. 1995). In this case, the Plaintiff introduced substantial evidence about her anxiety and depression she suffered for over two years because of Detective Freeman's conduct. Plaintiff's friends and family testified about the dramatic change in her appearance and behavior caused by the harass-

ment. The Court finds this evidence was sufficient to support the amount of damages that the jury awarded.

V. Attorneys Fees and Costs

With the agreement of the parties, the Plaintiff has withdrawn her motion for attorneys fees and costs pending the outcome of the Defendant's appeal. The Court will grant the Plaintiff leave to refile after the appeal is determined by the Court of Appeals.

An appropriate order accompanies this Memorandum Opinion.

/s/ 6/2/98
Date

/s/ Stanley Sporkin
Stanley Sporkin
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CYNTHIA D. CURRY,
Plaintiff,

v. Civil Action No. 97-1088

DISTRICT OF COLUMBIA,
Defendant.

FILED
June 3, 1998
Nancy Mayer-Whittington, Clerk
U.S. District Court

ORDER

This matter comes before the Court on (1) Defendant's motion for judgment as a matter of law, or, in the alternative, for a new trial or remittitur; and (2) Plaintiff's motion for attorneys fees and costs.

For the reasons stated in the accompanying Memorandum Opinion, it is hereby

ORDERED that Defendant's motion be **DENIED**, and it is further

ORDERED, with the agreement of the parties, that the Plaintiff's motion for attorneys fees and costs be **WITHDRAWN** with leave to refile pending the outcome of Defendant's appeal.

/s/ 6/2/98
Date

/s/ Stanley Sporkin
Stanley Sporkin
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 98-7121 **September Term, 1999**
97cv01088

Cynthia D. Curry,
Appellee

v.

District of Columbia,
Appellant

Condwell Freeman,
Appellee

UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT
FILED
FEB - 2 2000
CLERK

BEFORE: Henderson and Randolph, Circuit Judges

ORDER

Upon consideration of appellant's petition for rehearing filed December 9, 1999, and of the response thereto, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

Former Circuit Judge Wald was the third member of this panel.

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 98-7121 **September Term, 1999**
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Cynthia D. Curry,
Appellee

v.

District of Columbia,
Appellant

Condwell Freeman,
Appellee

UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT
FILED
FEB - 2 2000
CLERK

BEFORE: Edwards, Chief Judge; Silberman, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel, and Garland, Circuit Judges

ORDER

Upon consideration of appellant's petition for rehearing en banc, the response thereto, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

EXCERPTS FROM TRIAL

Testimony (March 18, 1998) of Lieutenant Emmogean Simpson-Jones re her conversation with Detective Curry on November 7, 1995:

A. I called the office and she happened to answer the telephone.

* * *

A. I think I asked her how was it going? . . .

A. She said that basically they were fine, but he was glaring at her.

Q. Did she tell tou that she wanted to file an EEO complaint about that?

A. No.

Plaintiff's Exhibit No. 2 (received March 17, 1998) (December 14, 1995, Memorandum from EEO Office of the District of Columbia Metropolitan Police Department (Director, Brenda S. Wilmore, and Lieutenant Alvin Bigelow) to Detective Cynthia D. Curry):

> This memorandum is in response to your request that Detective . . . Freeman be transferred . . .. Your complaint is that you are experiencing a "hostile environment," because he constantly "glares" at you. However, you related that there is no verbal communication between the two of you.
>
> Due to agency constraints, we are unable to act upon your request. I have been informed that you do not wish to change your assignment at this time; however, should you change your mind, this office would assist you in this endeavor. Please contact this office in the

event that you are subjected to any treatment which you deem to be harassment, or acts of reprisal and retaliation.